

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC 2002-000566

01/15/2004

HONORABLE MICHAEL D. JONES

CLERK OF THE COURT
P. M. Espinoza
Deputy

FILED: _____

STATE OF ARIZONA

ROGER KEVIN HAYS

v.

JOHN F NOLUND

JOHN R GAERTNER JR.

MESA CITY COURT
REMAND DESK-LCA-CCC
STATE BAR OF ARIZONA
DISCIPLINARY COUNSEL
111 W MONROE, STE 1800
PHOENIX AZ 85003-1742

MINUTE ENTRY

MESA CITY COURT

Cit. No. #804678

Charge: 1. DRIVING OR IN ACTUAL CONTROL OF MOTOR VEHICLE
 3. BAC OF .15% W/IN 2 HOURS OF DRIVING
 4. VIOLATION OF DRIVERS LICENSE RESTRICTIONS (A)
 5. UNSAFE LANE USAGE

DOB: 09/15/33

DOC: 02/24/02

This Court has jurisdiction of this appeal pursuant to the Arizona Constitution Article VI, Section 16, and A.R.S. Sections 12-124(A). This Court has considered the record of the proceedings, and the memoranda and arguments of counsel.

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This appeal follows from a State's Motion for Withdrawal of Plea Agreement granted by Judge Walter Spritzer in Appellant's Extreme DUI case in Mesa City Court, Division 1. Appellant argues that granting of this motion, and allowing the State to withdraw from a plea agreement favorable to the Appellant, was an abuse of discretion, and should be reversed.

On December 27, 2001, Appellant was arrested for DUI/Extreme DUI, in Mesa City Court, Division 4 (these are referred to as the "December charges", or December case)¹. On February 24, 2003, Appellant was arrested for DUI/Extreme DUI, in Mesa City Court, Division 1 (these are the charges in the instant case, referred to as the "February charges", or February case)². On May 2, 2002, Appellant pled guilty to Extreme DUI in the February case according to a plea agreement accepted by the court. On May 15, 2002, Appellant pled guilty to Extreme DUI in the December case also according to a plea agreement accepted by the court.

Term 7 of the plea agreement signed by Appellant and his counsel in this case (the "February charges") indicated that the Appellant "avows that he/she has not been served with a summons, arrested, indicted, charged, convicted, sentenced, or otherwise presented for a violation of A.R.S. 28-692, 1381, 1382, or 1383." Term 7 of the plea agreement expressly puts the onus of disclosure on the Appellant. When he signed the plea agreement, the Appellant avowed that he had not been charged for a violation for which, in truth, he had been charged within the past 60 months (the "December charges"). This avowal was false and misleading to the prosecutor and the trial judge.

In oral argument before this court, counsel (who was also the trial attorney for the Appellant) admitted curiosity regarding the provisions of Term 7 at the time of plea agreement negotiations. As both an advocate for his client, and an officer of the court, counsel had a duty to question the language, and either to have the language in controversy stricken, or not to accept and sign the plea agreement, when he knew the avowal to be false and fraudulent. The Arizona Rules of Professional Conduct prohibit a lawyer from, in the course of representing a client, knowingly making a false statement of material fact or law to a third person, and from knowingly failing to disclose a material fact to a third person when disclosure is necessary to avoid assisting a fraudulent act by a client.³ Further, a lawyer shall not knowingly make a false statement of material fact or law to a tribunal, nor offer evidence that the lawyer knows to be false.⁴ The Rules of Professional Conduct define professional misconduct to include engaging in conduct involving dishonesty, fraud, deceit or misrepresentation.⁵ Counsel for the Appellant should have known that his conduct was grossly improper.

¹ Case no. 2002000156

² Case no. 2002014663

³ Ariz. R. Prof. Conduct 4.1

⁴ Id. 3.3

⁵ Id. 8.4(c)

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Appellant argues that the trial court abused its discretion in granting the State's Motion to Withdraw from the Plea Agreement, but the "December charges" pending in Division 4 of the Mesa Municipal Court were charges of violation of A.R.S. 28-1381/1382⁶, clearly the type of crimes described by the plea agreement in Term 7, in this case. That plea agreement expressly indicated that the State may withdraw from the plea agreement "if the State learns of the existence of an undisclosed offense as described above" even if the plea agreement has been accepted by the court and judgment and sentence entered. The Arizona Rules of Criminal Procedure also regulate withdrawal of a plea. The court, in its discretion, may allow withdrawal of a plea of guilty when necessary to correct a manifest injustice.⁷ A manifest injustice may include fraud or misrepresentation.⁸

Both Term 7 of the plea agreement and Rule 17.5 of the Rules of Criminal Procedure leave to the discretion of the court whether to grant a motion to withdraw a plea. The trial court's decision to approve or reject a plea agreement falls within the trial court's sound discretion, and wide latitude is permitted in this regard.⁹ In order to reverse the decision of the trial court to withdraw the plea, Appellant must show an abuse of discretion by the trial judge. A judgment will be termed an abuse of discretion if the trial judge has failed to exercise sound, reasonable, and legal decision-making skills.¹⁰

Incredibly, the Appellant argues that because both the December and the February charges were pending in Mesa City Court, the prosecutor either did know, or should have known, about the pending "December charges" at the time of the "February charges" plea agreement. Appellant argues that the pending "December charges" are therefore not an "undisclosed offense" as defined in the plea agreement, preventing the withdrawal of the plea. However, as noted, the "December charges" were heard in Division 4 of Mesa City Court, while the "February charges" were in Division 1 of Mesa City Court, before a different judge (and, presumably, a different prosecutor). Appellant's argument ignores the clearly false representation made by Appellant and counsel in the plea agreement in Term 7. Frankly, counsel for the Appellant tried to pull a fast one, and secure lenient treatment for his client charged with two separate DUI cases, and he was caught in his lies and misrepresentations.

This court finds no abuse of discretion or error in the trial judge's order granting the State's Motion to Withdraw from the Plea Agreement.

IT IS ORDERED AFFIRMING the judgments and sentences of the Mesa City Court in this case.

⁶ "DUI" 1381: Driving or actual physical control while under the influence; "Extreme DUI" 1382: Driving or actual physical control while under the extreme influence of intoxicating liquor

⁷ Ariz. R. Crim. Proc. 17.5

⁸ *Silver v. State*, 37 Ariz. 418, 295 P. 311 (1931)

⁹ *State v. Lee*, 191 Ariz. 542, 959 P.2d 799 (1998)

¹⁰ *General Electric Co. v. Joiner*, 522 US 136 (1997)

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IT IS FURTHER ORDERED REMANDING this case back to the Mesa City Court for all further and future proceedings.

/ s / HONORABLE MICHAEL D. JONES

JUDICIAL OFFICER OF THE SUPERIOR COURT